BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

FRANCES A. GATLIN
(Claimant)

PRECEDENT
BENEFIT DECISION
No. P-B-108
Case No. 69-2214

S.S.A. No.

HOST INTERNATIONAL, INC.
(Employer)

Employer Account No.

The employer appealed from Referee's Decision No. LA-24292 which held that the claimant was not disqualified for benefits under section 1256 of the Unemployment Insurance Code and that the employer's account is not relieved of charges under section 1032 of the code. The employer filed written argument with this board. The claimant declined to file such argument. Such argument has not been received from the Department of Human Resources Development.

STATEMENT OF FACTS

The claimant worked for about one year and nine months as a snack bar attendant until she was discharged on January 18, 1969.

The employer hires a shopping service to observe the work performance of its employees. This service sends teams of three workers, including a supervisor, to the employer's concession and they observe the deportment of workers. If any violations of rules are observed, a verbal report over the telephone to the

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employer-customer is made immediately and a written report is mailed to the employer. Three shoppers observed the claimant's conduct on December 24, 1968 for about 30 minutes commencing around 8 a.m. One of the three shoppers testified at the hearing held before the referee. The shopper testified that the main emphasis of the observation was on the procedures employees use to ring up sales on the cash register. She testified that she is trained to observe everything that goes on during the time she and her co-workers are on the premises but that special attention is given to the transactions recorded on the cash register. After the shoppers have completed observing the workers, they go to a private automobile and discuss what they have seen, and write their reports. A portion of each report is completed by their supervisor.

The shopper testified that she went to the employer's snack bar on December 24, 1968 at 8 a.m. She was served by the claimant, and remained in the snack bar for about 30 minutes. She observed six or seven sales, including her own, during that time. She testified, and her written report indicates, that the claimant took the money tendered by the shopper and placed it in the cash register when the cash register drawer was open, but the claimant did not record the sale by punching keys on the cash register. Her testimony and report also indicated that money was received from another customer by the claimant, and deposited in the cash register, while the cash register drawer was open and the sale was not recorded by punching keys on the cash register. She testified but her report did not reflect that she had observed the claimant receive money from another customer and that she rang "no sale" on the cash register and returned change to the customer after placing the money in the cash register drawer. The supervisor's written report and the report of the other shopper indicated that this "no sale" transaction had occurred. A cash register tape showing the transactions observed by the shopper that testified at the hearing bears out the report that she made of her observations of the claimant's conduct during the 30-minute period.

The manager under whom the claimant worked no longer works for the employer. The claimant testified that the manager told her on January 18, 1969 that he

had to discharge her because of a report to the effect that she did not ring sales properly on December 24, 1968. She also testified that he said that he did not believe the report, but had to follow instructions. She denied that she had intentionally made any sale improperly for the purpose of pocketing the money. She admitted, however, that she made deposits at times when the cash register drawer was open, and that this was against the employer's rules as stated in an employer's handbook. The claimant had read this handbook and she was aware of the employer's rules regarding cash register procedure. The employer's rules were to the effect that the cash register was to be operated on a closed basis; that the customer was to be served and the purchase price received and rung up on the cash register immediately; and, that change, if any, was to be made and the cash register drawer closed after each transaction. The handbook stated that disciplinary action, including discharge, would result for violation of rules in the handbook.

The employer's records revealed that there was no overage in the cash register drawer, as compared to the amounts rung up on the cash register tape for December 24, 1968.

The claimant was discharged because of the shoppers' reports made for December 24, 1968. The claimant had received no prior warnings for her conduct regarding the operation of a cash register or for other matters.

REASONS FOR DECISION

Section 1256 of the Unemployment Insurance Code provides that an individual is disqualified for benefits, and sections 1030 and 1032 of the code provide that the employer's reserve account may be relieved of benefit charges, if the claimant has been discharged for misconduct connected with his most recent work.

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In Maywood Glass Company v. Stewart (1959), 170 Cal. App. 2d 719, 339 Pac. 2d 947, the court held that the term "misconduct," as it appears in section 1256 of the code, is limited to conduct which shows wilful or wanton disregard of the employer's interest, such as deliberate violations or deliberate disregard of the standards of behavior which the employer has a right to expect of his employee, or carelessness or negligence of such degree or recurrence as to show wrongful intent or evil design, or intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to his employer. On the other hand, mere inefficiency, unsatisfactory conduct, poor performance because of inability or incapacity, isolated instances of ordinary negligence or inadvertence, or good faith errors in judgment or discretion are not "misconduct." The court further held that the employer has the burden of establishing "misconduct."

Our research has led us to a line of Pennsylvania court decisions with which we agree.

In Sabatelli v. Board of Review (1950), 168 Pa. Super, 81, 76 A. 2d 654, the claimant was a bus driver. The employer had certain rules regarding the proper collection of fares. The claimant was trained for his job from January through April 1944. During that period of time the claimant had been warned about his failure to properly collect fares. The claimant received no further warnings. He knew the rules relative to the proper collection of fares. Between September 14, 1948 and November 20, 1948 the claimant was checked independently by eight inspectors, all of whom reported improper fare collections on 24 different occasions. No contention was made that the claimant was trying to defraud the employer. As a result of these reports, the claimant was discharged on November 23, 1948. The claimant contended that since he was not charged with attempting to defraud the employer, a finding of "misconduct" could not be sustained because the claimant's actions could not be deemed to be "wilful." The court did not agree and concluded that the improper collection of fares was not merely inadvertent; that the claimant was not a novice, but a veteran bus operator; that he knew the employer's rules about the proper collection of fares;

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that he demonstrated over a long period of time that he had the ability to perform the work properly; and, that viewed under these circumstances, the claimant's conduct was "wilful," and therefore his discharge was for "misconduct."

The Sabatelli case was followed in Coschi v. Unemployment Compensation Board of Review (1958), 186 Pa. Super. 154, 141 A. 2d 416, involving the discharge of a trolley car operator for failure to follow the employer's rules concerning the collection of fares on nine different occasions between December 26, 1956 and April 7, 1957.

In Benefit Decision No. 5913 the claimant was a checker in a grocery store and was familiar with the rules regarding the recording of sales. She was discharged for failing to follow proper procedure regarding the ringing up of sales. The claimant had not been warned about such conduct in the past. This board held that the discharge was for "misconduct."

In Benefit Decision No. 6091 the claimant was a linen supply route driver. In that case the claimant was discharged because he failed to report the return of a number of towels from one customer and the sale of these towels to another customer. This board held that this one instance of a failure to account for merchandise and money formed the basis for a finding of "misconduct."

In our opinion an employer has a fundamental right to establish reasonable rules for the handling of cash and other forms of remuneration received by employees on behalf of the employer as a result of sales or the performance of services. An experienced employee who knows such rules or who should know such rules, and fails to follow them, and is discharged for failure to follow them, is discharged for "misconduct." However, failure to follow such rules must be established by admissible, competent, relevant and material evidence. Finally, such a discharge is for "misconduct" even though the employee has received no prior warnings regarding such conduct, and conceivably in a proper case only one incident might be involved, and no showing need be made that the employee intended to profit from such conduct.

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Turning our attention now to the facts in the instant case, the record shows that the claimant was an experienced snack bar attendant. She was aware of the employer's rules for the handling of cash and violated them on at least three occasions. The rules were reasonable. The violations were established by an eyewitness to the events. The claimant was discharged because of this conduct. Such a discharge is for "misconduct" even though there had been no prior warnings regarding such conduct and there was no showing that the claimant intended to steal from or defraud the employer.

Insofar as the language used in Benefit Decision No. 6653 may be construed to hold that an employee must be warned of violations of the company rule in regard to the acceptance and recording of the employer's income before misconduct can be established, it is disaffirmed.

DECISION

The decision of the referee is reversed. The claimant was discharged for "misconduct" connected with her most recent work under section 1256 of the code. The employer's reserve account is relieved of benefit charges under section 1032 of the code.

Sacramento, California, April 22, 1971.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

ROBERT W. SIGG, Chairman

CLAUDE MINARD

JOHN B. WEISS

DISSENTING - Written Opinion Attached

LOWELL NELSON

DON BLEWETT

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DISSENTING OPINION

The majority in its opinion has cited the Maywood Glass Company case and has accurately paraphrased the definition of misconduct set down by the court in that case. However, to fully appreciate the implications of that definition, a brief review of the facts which were before the court will be helpful.

The claimant had been employed by Maywood for approximately five years as a selector and packer of glass products. She was discharged because she had packed a large amount of defective glassware. When she filed her claim for benefits she was interviewed by a representative of the Department and during this interview stated that although she packed defective glassware she knew better because of her experience and because she had been warned previously about packing defective products. The claimant was disqualified by the Department and on appeal to the referee testified under oath that she had never been warned as to the manner in which she accomplished her work. The court resolved this apparent conflict by stating:

> ". . . even if the claimant had been warned, the evidence does not compel a finding that she was guilty of 'misconduct' within the meaning of the statute. Although Mrs. Witt admitted packing defective bottles, she denied that she had intentionally done so . . . ."

Following this language the court stated that misconduct

> ". . . is limited to conduct evincing such wilful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful

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> intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. . . ."

The court also stated that "The employer has the burden of establishing 'misconduct' to protect its reserve fund."

In the present case the majority stated:

> ". . . An experienced employee who knows such rules or who should know such rules, and fails to follow them, and is discharged for failure to follow them, is discharged for 'misconduct.' However, failure to follow such rules must be established by admissible, competent, relevant and material evidence. Finally, such a discharge is for 'misconduct' even though the employee has received no prior warnings regarding such conduct, and conceivably in a proper case only one incident might be involved . . . ."

By this statement they have overruled the Maywood Glass case because under Maywood it is not only necessary to show that a rule has been violated, it must be shown that the violation was intentional, wilful, deliberate and wanton. This is serious action on the part of the majority because under section 409 of the code, those decisions designated as "precedent" are binding not only upon our referees but on the Director of the Department of Human Resources Development. Thus, these individuals are placed in the peculiar position of not knowing which decisions rendered by the courts to apply in matters which come before them.

It is interesting that the majority found it necessary to indulge in widespread research of decisions issued by other jurisdictions in order to find ones with which they agree. But it is unfortunate that they could

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find only the two cases cited by them because even a casual reading of those cases shows that they do not support the conclusion that the claimant in the present case was discharged for misconduct nor do the cases support the following dicta of the majority:

> ". . . Finally, such a discharge is for 'misconduct' even though the employee has received no prior warnings regarding such conduct, and conceivably in a proper case only one incident might be involved . . . ."

In Sabatelli the claimant had been observed by eight different "spotters" violating the rules of the employer on no less than 24 different occasions. In Coschi the claimant had been observed failing to follow the employer's rules on nine different occasions.

It is noteworthy that in the Sabatelli case the claimant admitted his violations but attempted to excuse his derelictions of duty by explaining that on one day on which he was observed violating the rules he was under considerable nervous strain because his mother-in-law was suddenly taken seriously ill by a heart attack and a football game created an extraordinary rush of bus patrons. There the court quoted with approval the finding of the Board of Review wherein the board stated:

> "We appreciate that under such circumstances the claimant would be under some strain and if the neglects had occurred only on that day, we would be inclined to the view that there was no willful misconduct. However, the record discloses that during the last two or three months of his employment there were numerous failures to register fares. The company does not contend and the record does not indicate that the claimant was trying to defraud the company. The claimant's course of conduct, however, indicates such a careless disregard of the company's rules and its welfare that we must conclude that his action constitutes willful misconduct within the meaning of Section 402(e) of the law."

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In the instant case the claimant was observed on one day violating the employer's rules as they related to accepting and registering money received for sales made. This observation was not made by the claimant's supervisor or by a fellow employee, but rather made by an individual employed by a service retained by the employer for the sole purpose of ascertaining and reporting if employer rules were being violated. While the claimant did not outright deny the report, she did testify that she did not remember violating the rule as reported by the "shopper."

In Sabatelli the claimant contended that his failure to follow the employer's rules was not "wilful." The court commented that "wilfulness exists where the injury to the employer . . . is so 'recklessly disregardful' that, even though there be no actual intent, there is at least a willingness to inflict harm, a conscious indifference to the perpetration of the wrong. In such case a constructive intention is imputable to him." Thus the court indicated that since the claimant's actions were wilful, he was guilty of misconduct. This is what the California court in Maywood stated must be established.

We are in agreement with the majority that "an employer has a fundamental right to establish reasonable rules for the handling of cash and other forms of remuneration received by employees on behalf of the employer as a result of sales or the performance of services." However, we should not be concerned, in this case at least, with whether or not the employer has a right to establish rules. What we should be concerned with is applying section 1256 of the code to the facts so as to be able to decide if the claimant was discharged for misconduct connected with her most recent work.

The facts here show that the claimant was observed violating the employer's rules on one day by an individual whose job depended upon uncovering rule violations by an employee. The employer did not discharge the claimant immediately but waited 25 days because her supervisor did not believe the shopper's report. There was no showing that there was any deliberate, wilful, wanton or intentional violation of rules by the claimant. All that was shown was that the shopper saw the claimant violate the rules.

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Whether we rely upon the finding of the California courts (Maywood Glass) or the Pennsylvania courts (Sabatelli and Coschi), we must find that this claimant was not discharged for misconduct connected with her most recent work.

In closing, we would remark that if the California courts would issue decisions with which the majority of this board could agree, widespread research of the decisions issued by other jurisdictions would be uncalled for and dissents such as this unnecessary.

LOWELL NELSON

DON BLEWETT

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